

FINDINGS OF FACT

After reviewing the record and considering the briefs and arguments of the parties, the Appeals Board concludes that the Award should be reversed and benefits denied.

1. On May 7, 1998, Gary R. Kilts was a 57-year-old truck driver for Harpers, Inc. Normally, he did not engage in loading or unloading the merchandise he transported. Unfortunately, none of the witnesses that testified in this case know for certain whether or not Mr. Kilts unloaded any freight that morning.
2. Mr. Kilts suffered a heart attack shortly after 7 a.m. while delivering a trailer load of soft drinks to Hale-Halsell, a grocery warehouse located in Tulsa, Oklahoma. The Hale-Halsell employee whose job it was to check the deliveries was Jim Bennett. Mr. Bennett testified that he thought Mr. Kilts arrived about 6:15 a.m. because that is the time that truck drivers generally arrive. He agreed that this time was an estimate and Mr. Kilts could have arrived earlier or later. When Mr. Kilts brought the paperwork to Mr. Bennett's office, Mr. Kilts was informed that the racks at Hale-Halsell would only fit pallets which were stacked eight layers high. Mr. Kilts' load was stacked ten layers high. Mr. Bennett told Mr. Kilts the top two layers of the load had to be removed and to make new pallets of eight. He also informed Mr. Kilts that the truck would not be unloaded by Hale-Halsell. Mr. Kilts responded that his delivery was a "no touch load", which meant that the driver was not supposed to unload the truck. Instead, it was his understanding that the warehouse was to do all of the unloading. Mr. Bennett repeated that the top two layers would have to be removed and that Hale-Halsell would not unload it. He advised Mr. Kilts that there were lumpers available at the warehouse that Mr. Kilts could hire to unload the truck. Ultimately, Mr. Bennett told Mr. Kilts that he should call his employer. June Kilts, the surviving spouse, testified that she was told by her husband's boss that he had spoken to Mr. Kilts on the telephone at about 7:10 a.m. It is Mr. Bennett's recollection that when he inspected the truck later that day it appeared to still be fully loaded.
3. The EMS records show that the dispatcher received a call at 7:13 a.m. One of the attending paramedics at the scene recorded that Mr. Kilts was on the telephone when he collapsed. Those records indicate: "PT was witnessed to go down on one knee & then collapsed to the floor while on the telephone."¹
4. MR. Kilts was transported to the emergency room at Hillcrest Medical Center. One of the physicians on duty there was Carolyn L. Cobb, M.D. Her understanding is that the emergency medical technicians found Mr. Kilts to be unresponsive when they arrived on the scene and Mr. Kilts remained that way thereafter. Dr. Cobb pronounced Mr. Kilts dead upon his arrival at the hospital emergency room. Dr. Cobb's records indicate:

¹ Claimant's Ex. 3 to Reg. H.

The patient is a truck driver who was unloading or loading freight at a location here in Tulsa. He was apparently doing fine, had just talked to his boss a few minutes before, suddenly went down to one knee and then went to the ground unresponsive.

Dr. Cobb testified that this information would have come from one of the EMT's who transported Mr. Kilts to the hospital.

5. Dan A. Francisco, M.D., who is board certified in internal medicine and cardiovascular disease, reviewed the records at the request of claimant's counsel. In his opinion Mr. Kilts' cause of death was "most likely an acute myocardial infarction with a second possibility even though probably lesser probability being an acute cerebral vascular insult, i.e., stroke." Given Mr. Kilts' risk factors, Dr. Francisco believes that unloading cases of pop weighing approximately 22 pounds could have been a triggering factor to his cardiac arrest. When asked if that opinion was within a reasonable degree of medical probability, he responded "[a]t least that and probably an overwhelming degree so I think it's considerably beyond a reasonable degree based on at least the facts that I had." Dr. Francisco conceded, however, that if Mr. Kilts was not performing manual labor of loading or unloading material at the time of his myocardial infarction or cerebral vascular accident, then his causation opinion would change.

CONCLUSIONS OF LAW

1. K.S.A. 1997 Supp. 44-501(e) provides that the injury and death from coronary or coronary artery disease is not compensable unless it is shown that the exertion at work which caused the condition is unusual:

Compensation shall not be paid in case of coronary or coronary artery disease . . . unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment.

2. The parties agree that unloading cases of soda pop from the trailer was not Mr. Kilts' usual work and would constitute unusual exertion. Respondent contends, however, that claimant has failed to prove by a preponderance of the credible evidence that Mr. Kilts was engaged in unloading product from his truck either before or at the time he suffered his fatal heart attack. The Board agrees.

3. The record does not establish that Mr. Kilts unloaded product from his truck. There is no mention of cases of pop being in the vicinity where Mr. Kilts collapsed. In fact, there is no evidence that cases of pop had been removed from the truck by anyone before Mr. Kilts' heart attack. The only witness to testify that was at the scene is Mr. Bennett. Although his recollection is hazy to say the least, it was his impression that no product had been unloaded from the truck when he inspected it after Mr. Kilts' accident. The Board

does not assume merely from the passage of perhaps 45 minutes to an hour of time that the truck was being unloaded and that Mr. Kilts had personally engaged in unloading his truck before his heart attack. The only other testimony to support this conclusion is that of Dr. Cobb. However, she admits that any information she had would have come from the EMT's that transported Mr. Kilts to the hospital. The EMT's records contradict the hospital emergency room records of Dr. Cobb, instead placing Mr. Kilts on the telephone when he collapsed. Dr. Cobb's entry could just as readily be understood to mean that Mr. Kilts was at the warehouse to deliver a load of freight as it could mean that Mr. Kilts was actually unloading freight himself at the time or shortly before he collapsed.

4. The admissibility of evidence in workers compensation proceedings is more liberal than under the Code of Civil Procedure.² And, hearsay evidence is admissible.³ Nevertheless, the Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.⁴ "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁵ The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.⁶

5. The Board's decision must be supported by substantial competent evidence.⁷ The term "substantial evidence" when applied to workers' compensation proceedings refers to evidence possessing of substance and capable of inducing conviction, or furnishing substantial basis of fact from which an issue can be reasonably resolved.⁸ Claimant has the burden of proving a causal relationship between the heart attack and the employment, and also that the exertion of the work necessary to precipitate the heart attack was more than the exertion of Mr. Kilts' usual work.⁹ "Causal relation is a necessary element in

² Roberts v. J.C. Penney Co., 263 Kan. 270, 281, 949 P.2d 613 (1997).

³ Pence v. Centrex Construction Co., 189 Kan. 718, 371 P.2d 100 (1962).

⁴ K.S.A. 44-501(a); see also Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

⁵ K.S.A. 44-508(g). See also In re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 44-501(g).

⁷ Griffin v. Dale Wiley Pontiac-Cadillac-GMC Truck, Inc., 268 Kan. 33, 34, 991 P.2d 406 (1999).

⁸ Drake v. State Dept. of Social Welfare-Larned State Hospital, 210 Kan. 197, 199, 499 P.2d 532 (1972).

⁹ Ford v. Robert S. Wise, Inc., 202 Kan. 752, 451 P.2d 251 (1969).

establishing liability under our workmen's compensation act and it cannot be presumed but must be proved by the preponderance of the evidence."¹⁰

6. Based upon the record presented, the Board finds the greater weight of the credible evidence fails to support the claimant's contention of unusual exertion because claimant has failed to prove that Mr. Kilts engaged in unloading his truck. Therefore, benefits must be denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the February 1, 2001, Award entered by Administrative Law Judge John D. Clark should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of July 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joni J. Franklin, Wichita, KS
Christopher J. McCurdy, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director

¹⁰ Smith v. Allied Mutual Casualty Co., 184 Kan. 814, 818, 339 P.2d 19 (1959).